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In the Supreme Court of the United States

October Term, 1974

No. 73-1471

UNITED STATES OF AMERICA
AND FEDERAL COMMUNICATIONS
COMMISSION

v.

NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF OHIO IN SUPPORT OF THE NEW JERSEY STATE LOTTERY COMMISSION

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THE JUDSON BROOKS COMPANY - CLEVELAND

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Your amicus is a state which conducts a lottery and is affected by *United States of America and Federal Communications Commission v. New Jersey State Lottery Commission*, No. 73-1471.

STATEMENT

Jersey Cape Broadcasting Corporation ("Jersey Cape"), the licensee of stations WCMC-AM, FM and TV, Wildwood, New Jersey, in February, 1971 requested that the Federal Communications Commission ("FCC") issue a declaratory ruling as to whether its proposed broadcast of a statement ["The winning state lottery number drawn today is (and then recite the winning number)."] during

three consecutive regular news broadcasts on the day of the New Jersey Lottery drawing and at no other time would violate 18 U.S.C. § 1304 of the Communications Act of 1934, which provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

In response to this ruling request (which was later joined in by the New Jersey State Lottery Commission and others), the FCC issued a declaratory ruling holding that the broadcasting of this announcement was prohibited by 18 U.S.C. § 1304 as it would directly promote a lottery, even if the winning number had some news value to some persons. The New Jersey State Lottery Commission appealed the FCC's ruling to the Third Circuit Court of Appeals, which reversed the FCC and held that on Thursday afternoon and evening the winning lottery number is "hot news" and, as such, is protected both by the First Amendment to the United States Constitution and by another section of the Communications Act of 1934 (47 U.S.C. § 326) which provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

The opinion of the Third Circuit Court of Appeals is reported at 491 F.2d 219 (3rd Cir. 1974).

It should be noted that on each Thursday, the New Jersey State Lottery Commission has a difficult time meeting the public demand for the identity of the winning number. On August 19, 1971, its telephone service was temporarily suspended because of an avalanche of telephone calls. On a typical Thursday there are approximately 2,750,000 ticketholders, who, it may be assumed, would like to know the winning number. These 2,750,000 ticketholders are the equivalent of 58 percent of New Jersey's adult population. It is further estimated by the New Jersey State Lottery Commission that at least one person in eighty percent of the State's households holds a lottery ticket in any given week.

Since Ohio's lottery has been in operation only since August of 1974, there has, as yet, been no systematic study conducted to identify the buying habits of Ohio's citizens, but based upon an estimated average weekly sale of 4,600,000 lottery tickets, it can be assumed that the comparative figures for Ohio will at least approximate those provided by the New Jersey State Lottery Commission for the State of New Jersey.

Jersey Cape has decided as an exercise of its editorial judgment that a broadcast of the winning number is newsworthy and merely wishes to provide as part of its regularly scheduled news show, information which is of interest to persons in as many as eighty percent of the households in New Jersey.

ARGUMENT

A logical reconciliation of 18 U.S.C. § 1304, 47 U.S.C. § 326 and the First Amendment requires that the broadcasting as part of a regularly scheduled news show of a winning number drawn in a lawful state operated lottery is not prohibited by 18 U.S.C. § 1304.

As noted in the unanimous decision of the Third Circuit, sitting *en banc*, the FCC made no effort to reconcile 18 U.S.C. § 1304 with 47 U.S.C. § 326 and relied entirely on the former statute and the Second Circuit's decision in *New York State Broadcasters Association v. United States*, 414 F. 2d 990 (2nd Cir. 1969), certiorari denied, 396 U.S. 1061 (1970), a case which did not consider 47 U.S.C. § 326, but nonetheless limited the scope of 18 U.S.C. § 1304 to broadcasts which directly promote an existing lottery.

The Third Circuit referred to the FCC's ruling as imposing a "small" prior restraint, but a prior restraint nonetheless and one which could not be justified. It is submitted that any ruling which restrains 58 percent of New Jersey's adult population from learning of information concerning their State's activities cannot, by definition, be a "small" prior restraint.

In light of the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech, or of the press", 18 U.S.C. § 1304 as applied by the FCC in this instance must be held unconstitutional or construed in such a way as to make it compatible with freedom of the press. There is nothing in the legislative history of 18 U.S.C. § 1304 to indicate that Congress intended to grant to the FCC the power to control editorial decisions of broadcast journalists and 47 U.S.C. § 326 specifically negates any such intention.

The Third Circuit properly reviewed the holdings of this Court and held that Jersey Cape's proposed announcements of the winning lottery numbers are news:

> On Thursday afternoon and evening the winning lottery number is "hot news". 491 F. 2d at 222.
>
> Clearly the winning lottery number is, on Thursday afternoon, press information protected by the first amendment. *id.* at 223.

> The announcements here involved are unadulterated broadcast journalism — news — and clearly are protected by 47 U.S.C. § 326 and the first amendment rather than prohibited by 18 U.S.C. § 1304. *id.* at 224.

Having properly determined that Jersey Cape's proposed broadcast was "hot news", the Third Circuit analyzed this Court's opinions concerning circumstances where prior governmental restraints over a broadcaster's news activities could be appropriate. These included cases dealing with a broadcaster's commercial activities and Congress' right to assure that broadcasters provide fair access of competing ideas to the limited broadcast frequencies. These cases, however, were properly distinguished as not involving, as in this instance, a broadcaster who "seeks no more than to include in its regular news broadcasts on Thursday a news item of immediate, though transitory, interest to 2,750,000 persons." 491 F.2d at 223.

47 U.S.C. § 326 makes it clear that Congress did not intend that the Communications Act of 1934 impose restrictions on broadcast licensees which would violate the First Amendment. In this regard, any such legislative intention to restrict legitimate news broadcasts by 18 U.S.C. § 1304 is specifically and unequivocally negated by 47 U.S.C. § 326.

The Third Circuit appropriately sought to avoid the constitutional question and properly reconciled the two sections of the Communications Act of 1934 by restricting the application of 18 U.S.C. § 1304 to a "promotion of lotteries for which the licensee receives compensation." 491 F. 2d at 224. This is a correct ruling and should be upheld.

This is especially so in light of the FCC's contention that the Second Circuit's ruling in *New York State Broadcasters Association v. United States, supra*, Pg. 4, (only broadcasts which directly promote a lottery are prohibited

by 18 U.S.C. § 1304) requires that Jersey Cape's proposed announcements of the winning lottery numbers be prohibited as a direct promotion of the New Jersey Lottery. This is an erroneous interpretation and extension of the Second Circuit's decision for these broadcasts at best only incidentally foster the New Jersey Lottery and are not directly promotional as that term was used by the Second Circuit. In addition, the Second Circuit did not consider the mandate of 47 U.S.C. § 326 against FCC censorship when it considered the application of 18 U.S.C. § 1304, and if its decision is meant to prohibit "unadulterated" or "hot" news which might also directly promote a lottery, then its interpretation of 18 U.S.C. § 1304 is flawed and should not be followed.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Dated this 8th day of October, A.D., 1974

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN T. PARISI, Special Counsel to William J. Brown, Attorney General of the State of Ohio, Amicus Curiae, certify that three copies of the foregoing Amicus Curiae Brief, were mailed, via U. S. Mail, postage prepaid, to the following attorneys of record: Stephen Skillman, Assistant Attorney General, State of New Jersey, State House Annex, Trenton, New Jersey 08625; David H. Souter, Deputy Attorney General, State of New Hampshire, State House Annex, Concord, New Hampshire 03301; Daniel R. Schaefer, Assistant Attorney General, State of Connecticut, 30 Trinity Street, Hartford, Connecticut 06115; John B. Summers, National Association of Broadcasters, 1771 N Street, N.W., Washington, D. C. 20036; Israel Packel, Attorney General, State of Pennsylvania, 238 State Capitol, Harrisburg, Pennsylvania 17120; Louis Schwartz, 1900 L Street, N.W., Washington, D. C. 20036; Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530; Thomas B. Kauper, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; Lovis Claiborne, Assistant Solicitor General, Department of Justice, Washington, D. C. 20530; Danny J. Boggs, Assistant Solicitor General, Department of Justice, Washington, D. C. 20530; Ashton R. Hardy, General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554; Joseph A. Marino, Associate General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554; R. Michael Senkowski, Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

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